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Supreme Court of the United States

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No. 25

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

CARDOX CORPORATION, PETITIONER,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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[fol. 1] [Caption omitted]

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-Two Fire Equipment Company, Petitioner,

vs.

John P. Barnes, Chief Judge of the United States District Court for the District of Illinois, Northern Division, Respondent

Application for Leave to File Petition for Writ of Mandamus—Filed October 29, 1951

Petitioner respectfully applies for leave to file the annexed Petition and accompanying brief on the grounds set forth therein.

Respectfully submitted, Irving Herriott, 120 South LaSalle Street, Chicago, Illinois, Attorney for Petitioner.

Pennie, Edmonds, Morton, Barrows & Taylor, R. Morton Adams, 247 Park Avenue, New York 17, New York, Of Counsel.

[fols. 5-6] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

Before Hon. J. Earl Major, Chief Judge

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Chief Judge of the United States District Court for the District of Illinois, Northern Division, Respondent

RULE TO SHOW CAUSE—October 29, 1951

Petitioner, having applied for leave to file a Petition for Writ of Mandamus in the above-entitled case, and such leave having been granted, it is ordered:

1. That a copy of this order and a copy of said Petition and supporting brief be served upon Respondent forthwith;
2. That Respondent file in this Court an original and four (4) copies of his Answer to the Petition for a Writ of Mandamus within thirty (30) days from this date.
3. That all proceedings in the Court below be and hereby are stayed until final determination of said Petition by this Court.

[fol. 7] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

PETITION FOR WRIT OF MANDAMUS—Filed October 29, 1951

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Petitioner, C-O-Two Fire Equipment Company, a corporation organized and existing under the laws of the State of Delaware, but having its principal place of business in

Newark, New Jersey, files this, its petition for writ of mandamus to The Honorable John P. Barnes, Judge of the United States District Court for the Northern District of Illinois, directing him to nullify, vacate, and set aside an order entered by him on the 15th day of October, 1951, in a case entitled Cardox Corporation v. C-O-Two Fire Equipment Company, Civil Action No. 51C1007 in the United States District Court for the Northern District of Illinois, Eastern Division, denying a motion of petitioner for an order dismissing said action for improper venue; and either directing said Honorable Judge to dismiss said action for improper venue or to exercise his discretion and transfer said action to a district of proper venue; and for cause show:

I. Nature of the Suit and Proceedings

On June 26, 1951, petitioner, as defendant, was sued for alleged patent infringement by Cardox Corporation, as plaintiff, in the United States District Court for the Northern District of Illinois, Eastern Division. A copy of the [fol. 8] complaint is annexed hereto as Exhibit A.

The complaint alleged that the action arose under the Patent Laws of the United States and based venue on the allegation:

> "Defendant, C-O-Two Fire Equipment Company, is a corporation organized and existing under the laws of the State of Delaware, and is licensed to do business in the State of Illinois, is a resident of and has a regular and established place of business in and is doing business in the Northern District of Illinois, Eastern Division, with offices at 444 North Lake Shore Drive, Chicago, Illinois."

There is no allegation or contention that defendant, petitioner herein, had committed any acts of infringement within the Northern District of Illinois.

Defendant, petitioner herein, in order to secure the protection afforded defendants by the venue provision for patent infringement cases (28 U.S.C. 1400(b)) filed a motion on July 12, 1951 that the complaint be dismissed for improper venue. A copy of said motion and supporting affidavits are annexed hereto as Exhibit B.

The grounds of said motion were that Sec. 1400(b) of Title 28, United States Code had not been complied with in either of the statutory venue requirements; namely, that the suit had not been brought in the district of defendant's incorporation, or in the district where defendant had a regular and established place of business and had committed the alleged acts of infringement.

Affidavits of the President, Scott E. Allen and the Secretary, Ralph F. Batch, of the defendant company, submitted in support of said motion, established that, although defendant was licensed to do business and had a place of business within the Northern District of Illinois, such business as was transacted there, was not related to the alleged infringing acts and that defendant had committed no alleged infringing act within the Northern District of Illinois, but [fol. 9] that it had committed acts of the kind complained of in the State of New Jersey where defendant maintains its principal office and manufacturing plant, keeps all its books and records relating to the alleged infringing activities and where its officers, engineers and employees who are acquainted with the alleged infringing activities are located.

Defendant, petitioner herein, also suggested to the District Court, that instead of dismissing the action, it would be appropriate to transfer said action under the discretionary provision of Sec. 1406(a) of Title 28 United States Code.

Memoranda were filed on behalf of the plaintiff and defendant and the motion came on for hearing before The Honorable John P. Barnes on October 15, 1951. Judge Barnes declined to hear argument and decided the matter from the bench without formal opinion.

An order was entered denying defendant's motion on the 15th day of October, 1951. A copy of said order is annexed hereto as Exhibit C.

It is the action of respondent in entering this order and in retaining jurisdiction of the case and in refusing to dismiss or transfer the case for improper venue that petitioner prays be reviewed and corrected by this Court.

II. Basis of This Court's Jurisdiction

Jurisdiction in this Court is invoked pursuant to Sec. 1651(a) of Title 28, United States Code, which authorizes

the Courts of Appeal to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. *Fettig Canning Company* v. *Steckler*, 188 F. 2d 715 (7 Cir., 1951); *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (3 Cir., 1951); *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (5 Cir., 1950); *Shapiro* v. *Bonanza* [fol. 10] *Hotel Co.*, 185 F. 2d 777 (9 Cir., 1950); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2 Cir., 1950); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (2 Cir., 1950); *Gulf Research & Development Co.* v. *Harrison*, 185 F. 2d 457 (9 Cir., 1951).

In all of the foregoing cases the Courts of Appeal entertained petitions for writs of mandamus on matters of venue.

III. Reasons for Allowance of Writ

Petitioner submits that this is an appropriate case under the above authorities for this Court to exercise its power to issue a writ of mandamus under Sec. 1651(a) of Title 28, United States Code, for the following reasons:

1. The District Court has retained jurisdiction over the action without authority in law. Petitioner has been deprived of its right given to it by Sec. 1400(b) of Title 28, United States Code to be sued where it is incorporated or where it has a regular and established place of business and has committed acts of infringement, even though it has seasonably objected to the deprivation of that right.

2. The injury to petitioner cannot be corrected by appeal from the order complained of because said order is interlocutory and is not appealable. It does not dispose of the case or any separate issue therein.

3. The injury to petitioner cannot be corrected upon appeal from final judgment because:

a. Petitioner will not be able to show that a different result would have been reached had the action been tried in the proper jurisdiction and,

b. The protection given to defendants by Sec. 1400(b) of Title 28 United States Code against the inconvenience and annoyance of having to defend a charge of [fol. 11] infringement in a district remote from the one where the alleged infringing acts took place or where defendant is incorporated, will be destroyed if defendant is compelled to go through a trial of the case on the

merits in the present district which is remote from Delaware where it is incorporated and from New Jersey where it has its principal office and has committed alleged acts of infringement. This statutory protection having been once destroyed by going through trial can never be recreated. The inconvenience and annoyance, once having occurred, cannot be wiped out and the injury is not susceptible of compensation by damages.

4. The question presented is an important matter on which this Court should rule not only in protection of defendant petitioner but also in the interest of the orderly administration of justice.

Wherefore petitioner prays:

(A) That an order be issued staying all proceedings in the Court below until the determination by the Court of this petition,

(B) That an order be issued directed to respondent, The Honorable John P. Barnes, Judge of the United States District Court for the Northern District of Illinois, to show cause, if any there be, why a writ of mandamus should not issue, said order to be returnable as promptly as the situation permits,

(C) That, upon determination by this Court, a writ of mandamus be issued, directing respondent to nullify, vacate, and set aside, the order entered the 15th day of October, [fol. 12] 1951 in said *Cardox Corporation* v. *C-O-Two Fire Equipment Company* denying petitioner's motion to dismiss said action and directing respondent to dismiss said action or in the alternative to exercise sound discretion and transfer said action to a district of proper venue, and

(D) That petitioner have such other and further relief as may be deemed to be proper and justifiable under all the facts and circumstances.

Irving Herriott, Montgomery, Hart, Pritchard and Herriott, 120 South LaSalle Street, Chicago, Illinois, Attorney for Petitioner.

R. Morton Adams, Pennie, Edmonds, Morton, Barrows and Taylor, 247 Park Avenue, New York 17, New York, Counsel for Petitioner.

[fol. 13] EXHIBIT "A" TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 1007

Equitable Relief Sought

CARDOX CORPORATION, Plaintiff,

vs.

C-O-TWO EQUIPMENT COMPANY, Defendant

Complaint

1. Plaintiff, Cardox Corporation, is a corporation duly organized and existing under the laws of the State of Illinois with its principal place of business at 307 North Michigan Avenue in Chicago, County of Cook, and State of Illinois.

2. Defendant, C-O-Two Fire Equipment Company, is a corporation organized and existing under the laws of the State of Delaware, and is licensed to do business in the State of Illinois, is a resident of and has a regular and established place of business in and is doing business in the Northern District of Illinois, Eastern Division, with offices at 444 North Lake Shore Drive, Chicago, Illinois.

3. This action arises under the patent laws of the United States.

4. On January 10, 1939, United States Letters Patent No. 2,143,311 were duly and legally issued to Cardox Corporation, the plaintiff, as assignee of Eric Geertz, Cardox Corporation, the plaintiff, since the date of the issuance of said patent, has been and now is the owner of the entire right, title and interest in and to said Letters Patent.

[fol. 14] 5. On May 28, 1940, United States Letters Patent No. 2,202,343, were duly and legally issued to Cardox Corporation, the plaintiff, as assignee of Eric Geertz. Cardox Corporation, the plaintiff, since the date of the issuance of said patent, has been and now is the owner of the entire right, title and interest in and to said Letters Patent.

6. On March 3, 1942, United States Letters Patent No. 2,274,783 were duly and legally issued to Cardox Corpora-

tion, the plaintiff, as the assignee of Eric Geertz. Cardox Corporation, the plaintiff, since the date of the issuance of said patent, has been and now is the owner of the entire right, title and interest in and to said Letters Patent.

7. Defendant for some time past has been, and now is, aiding, abetting and contributing to the infringement of said Letters Patent No. 2,143,311 by manufacturing and causing to be manufactured, by selling, and by installing and causing to be installed, fire extinguishing apparatus with the knowledge and intent that such apparatus will be and has been used by the purchaser for the purpose of utilizing the methods covered by said Letters Patent.

8. Defendant for some time past has been, and now is, infringing said Letters Patent No. 2,202,343 by manufacturing and causing to be manufactured, by selling, and by installing and causing to be installed, fire extinguishing apparatus embodying the said patented invention.

[fol. 15] 9. Defendant for some time past has been, and now is, infringing said Letters Patent No. 2,274,783 by manufacturing and causing to be manufactured, by selling, and by installing and causing to be installed, fire extinguishing apparatus embodying the said patented invention.

Wherefore, plaintiff demands a preliminary and final injunction against further infringment by defendant, an accounting for damages, an assessment of costs against defendant, and such other relief as to the Court may seem just.

Cardox Corporation, (S.) By Andrew J. Dallstream, 231 S. LaSalle Street, Chicago 4, Illinois; (S.) Frederic H. Stafford, 231 S. LaSalle Street, Chicago 4, Illinois; (S.) George I. Haight, 209 S. LaSalle Street, Chicago 4, Illinois, Attorneys for Plaintiff.

[fol. 16] EXHIBIT "B" TO PETITION

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 1007

CARBOX CORPORATION, Plaintiff,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY, Defendant

Motion Under Rule 12b F.R.C.P. to Dismiss for Improper Venue

Now comes defendant, by its attorneys, Dawson and Ooms, appearing specially and moves that the Complaint herein be dismissed on the ground of improper venue.

In support thereof, defendant will rely on the following:

(a) defendant is a corporation of Delaware;

(b) the pleadings herein do not allege any acts of infringement within the Northern District of Illinois as required by 28 U. S. Code 1400(b);

(c) as shown by an affidavit of an officer of defendant company, submitted herewith no acts of infringement have in fact taken place within the Northern District of Illinois.

Casper W. Ooms, Owen J. Ooms, Dawson and Ooms, Attorneys for Defendant, 209 South LaSalle Street, Chicago, Illinois.

Of Counsel: R. Morton Adams, Edward F. Connors, New York City.

July 11, 1951.

[fol. 17] AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS FOR IMPROPER VENUE

STATE OF NEW JERSEY,
County of Essex, ss:

I, Ralph F. Batch, being duly sworn, depose and say:

That I am the Secretary of the C-O-Two Fire Equipment Company.

That I am familiar with the business of the C-O-Two Fire Equipment Company.

That the C-O-Two Fire Equipment Company is a corporation of Delaware.

That the main office and manufacturing plant of the C-O-Two Fire Equipment Company is located in Newark, New Jersey.

I am advised that the three patents alleged in the complaint herein to be infringed numbered 2,143,311, 2,202,343 and 2,274,783 relate to low temperature fire extinguishing equipment.

That the C-O-Two Fire Equipment Company has never manufactured, used nor sold, nor caused to be manufactured, used nor sold, nor installed, nor caused to be installed, any low temperature fire extinguishing equipment, within the territory of the Northern District of Illinois.

(Signed) Ralph F. Batch.

Sworn to before me this 9th day of June, 1951.
(Signed) Elizabeth Gauld, Notary Public.

[fol. 18] In the United States District Court for the Northern District of Illinois, Eastern Division

Civil Action. No. 51C1007

Cardox Corporation, Plaintiff,

vs.

C-O-Two Fire Equipment Company, Defendant

Affidavit

State of New Jersey,
County of Essex, ss:

I, Scott E. Allen, being duly sworn, depose and say:

I am the president of the C-O-Two Fire Equipment Company, a Delaware corporation, organized and existing under the laws of the State of Delaware and maintaining its main offices and its factories in the City of Newark, State of New Jersey, within the District of New Jersey.

I am familiar with the business operations of the C-O-Two Fire Equipment Company.

This company manufactures and sells both so-called low-pressure fire extinguishing equipment and systems, and high-pressure fire extinguishing equipment and systems.

I am advised that the patents charged in this suit to have been infringed relate only to low-pressure equipment and systems. This company has never made, used or sold low-pressure equipment or systems within the Northern District of Illinois or committed any of the acts complained of within the Northern District of Illinois. It has made and sold such [fol. 19] equipment at its main office and plant in Newark, New Jersey.

All manufacturing by the company is done at its plant in Newark, New Jersey. All sales are made at the main office located at the plant. Any use by this company is merely incidental to manufacture and takes place at the manufacturing plant.

All manufacturing records, engineering records, sales records, and all other records of the company are located in fire-proof vaults at the main office in Newark, New Jersey.

Although the company is licensed to do business in Illinois, it has no regular and established place of business there and, as previously stated, it has not performed any of the alleged infringing acts there. Its only activities in Illinois consist of maintaining a small stock of high-pressure apparatus (not low-pressure apparatus) and two sales representatives to solicit orders. These representatives are not agents of the company and have no authority to bind the company. All orders taken through such representatives are transmitted to the main office in Newark for confirmation and no sales are made without such confirmation.

The company would welcome an early adjudication of the charged infringement. However, to litigate said question in Chicago where it has no place of business, no records and no alleged infringing apparatus and has committed no alleged acts of infringement, instead of in New Jersey where its main office and plant and personnel and records are located, is regarded as an unwarranted burden.

[fol. 20] I am advised that, inasmuch as the company has a regular and established place of business in Newark, New Jersey and has there manufactured and sold the equipment complained of, the present action could have been brought in the District of New Jersey.

(Signed) Scott E. Allen.

Sworn to before me this 23rd day of July, 1951.
(Signed) Madeline R. McHugh.

[fol. 21] Certificate of Notary as to Date of Execution of Affidavit of Ralph F. Batch in Support of Motion to Dismiss

I hereby certify that the affidavit of Ralph F. Batch was executed on July 9, 1951 and that the date of June 9, 1951 appearing on the affidavit is erroneous.

(Signed) Elizabeth Gould, Notary Public. (Seal.)

Dated: July 27, 1951.

[fol. 22] EXHIBIT "C" TO PETITION

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Monday, October 15, 1951.

Present: Honorable John P. Barnes, District Judge.

No. 51 C 1007

CARDOX CORPORATION

vs.

C-O-TWO EQUIPMENT COMPANY

The Court being fully advised in the premises it is

Ordered that the motion of the defendant to dismiss, or, in the alternative, to transfer this cause be and it is hereby denied and it is

Further ordered that the defendant be and is hereby given thirty days within which to file answer hereia.

[fols. 23-25] UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois do hereby certify the above and foregoing to be a true and correct copy of an original order made and entered in said Court on the 15th day of October, 1951, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 26th day of October, 1951.

Roy H. Johnson, Clerk, by E. B. Davis, Deputy Clerk.

[fols. 26-27] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

ANSWER—Filed November 15, 1951

Comes now the respondent, John P. Barnes, who, having been ruled to file in this court an original and four copies of his answer to the petition for a writ of mandamus within thirty days from the date of the rendition of said rule, prays that this paper writing may be taken and regarded as such answer.

The respondent says that he has no interest in this cause or in the issues thereof, other than such interest as any other citizen of the United States should have; that said limited interest does not, in respondent's opinion, warrant his becoming an actor in this cause, or warrant (1) his taking the time from his official duties to prepare and present an answer other than this or (2) his engaging and paying counsel to represent him in the preparation and presentation of such answer or (3) his becoming obligated to counsel who would doubtless represent respondent without expectation of remuneration by him.

John P. Barnes, Respondent.

November 14, 1951.

[fol. 28] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

PETITION FOR LEAVE TO INTERVENE—Filed November 27, 1951

Now comes Cardox Corporation, a corporation of Illinois, and shows the Court:

1. That a petition was filed herein on October 29, 1951 for a writ of mandamus directing the Honorable John P. Barnes, Chief Judge of the United States District Court for The Northern District of Illinois, to nullify, vacate and set aside an order entered by him on the 15th day of October, 1951, in a case entitled Cardox Corporation vs. C-O-Two Fire Equipment Company, Civil Action No. 51 C 1007, denying a motion of petitioner for an order dismissing said action for improper venue.

2. Cardox Corporation is plaintiff in the said case entitled Cardox Corporation vs. C-O-Two Fire Equipment Company, Civil Action No. 51 C 1007.

3. On October 29, 1951, this Court entered an order to show cause which, *inter alia*, ordered that all proceedings in the District Court be stayed until final determination of said petition.

4. On November 14, 1951, the said Honorable John P. Barnes, respondent, filed his answer herein disclaiming interest in this cause, or the issues thereof, other than such interest as any other citizen of the United States should have.

[fols. 29-30] 5. That any decision rendered on said petition for mandamus will have material effect upon the interest of said Cardox Corporation.

Wherefore, Cardox Corporation prays the Court that it be allowed to intervene herein in opposition to the petition

for writ of mandamus, to file a pleading in opposition to the petition for writ of mandamus within ten (10) days of the date of entry hereof, and to file a brief and participate in oral argument herein.

Cardox Corporation, By its Attorneys, Andrew J. Dallstream, Fredric H. Stafford, 231 South LaSalle Street, Chicago 4, Illinois; George I. Haight, John W. Hofeldt, 209 South LaSalle Street, Chicago 4, Illinois.

Dated: November 26, 1951.

[fols. 31-32] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—November 27, 1951

Cardox Corporation having petitioned for leave to intervene herein, it is ordered:

1. That leave is hereby given to Cardox Corporation to intervene herein in opposition to the petition for writ of mandamus.

2. That Cardox Corporation may file a pleading in opposition to the petition for writ of mandamus within ten (10) days from the date hereof.

3. That Cardox Corporation may file a brief in support of its pleading within thirty (30) days from the date hereof.

4. That Petitioner may file a brief in reply thereof within fifteen (15) days thereafter and that the brief heretofore filed by Petitioner shall be considered its brief on the merits.

5. That Cardox Corporation may participate in oral arguments herein.

[fol. 33] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

INTERVENER'S ANSWER TO PETITION FOR WRIT OF MANDAMUS—Filed December 7, 1951

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Intervener, Cardox Corporation, in accordance with leave granted to it to intervene and to file a pleading in opposition to the Petition for Writ of Mandamus, files this, its answer to said petition.

1. Intervener admits that on June 26, 1951 it sued Petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, for patent infringement, in the action pending therein entitled *Cardox Corporation v. C-O-Two Fire Equipment Company*, Civil Action No. 51 C 1007; and further admits that Petitioner's Exhibit A is a true and authentic copy of the complaint in that action.

2. Intervener admits that there was no allegation in said complaint that Defendant (Petitioner herein) had committed any acts of infringement within the Northern District of Illinois.

3. Intervener admits that Defendant (Petitioner herein) filed a motion on July 12, 1951, asking that the complaint be [fol. 34] dismissed for improper venue and that Petitioner's Exhibit B is a true and authentic copy of the motion and supporting affidavits.

4. Intervener admits that the grounds of said motion were that Sec. 1400(b) of Title 28, U. S. Code had not been complied with but denies that such was the case and alleges that

that section had been fully complied with in that the venue was grounded upon the fact that Defendant (Petitioner herein) resided and resides in the Northern District of Illinois as required by that section and that the term "resides" as used therein is defined in Sec. 1391(c) of Title 28, U. S. Code, which provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Intervener denies that Sec. 1400(b) of Title 28, U. S. Code, requires that a suit for patent infringement be brought in a judicial district where a defendant has a regular and established place of business and had committed acts of infringement or, in the alternative, that such suit be brought in the judicial district of a defendant's "incorporation" as alleged on page 2 of the Petition for Writ of Mandamus.

5. Intervener admits that affidavits of Scott E. Allen, president, and Ralph F. Batch, secretary, of the Defendant (Petitioner herein) were submitted in support of said motion and state the matters alleged in the paragraph beginning on the bottom of page 2 and continuing to page 3 of Petition for Writ of Mandamus, but deny the inferences sought to be created that Defendant's infringing activities are confined to the State of New Jersey.

[fol. 35] 6. Intervener admits that Defendant (Petitioner herein) also requested the District Court to transfer said action under the discretionary provision of Sec. 1406(a), Title 28, U. S. Code.

7. Intervener admits that memoranda were filed on behalf of the Plaintiff (Intervener herein) and Defendant (Petitioner herein) and that the motion came on for hearing before the Honorable John P. Barnes, (Respondent herein) on October 15, 1951. Intervener denies the inferences sought to be created by the statement on page 3 of the Petition for Writ of Mandamus that the Honorable John P. Barnes (Respondent herein) "declined to hear argument and decided the matter from the bench" but alleges the fact to be that prior to October 15, 1951, Petitioner filed a memoran-

dum of 16 pages and a reply memorandum of 9 pages and that Intervener filed a memorandum of 14 pages which were read and considered by the Respondent and that Petitioner upon oral argument presented no matter not covered in said memoranda; and Intervener further alleges that Respondent had previously considered briefs and arguments directed to the same point of law in another case.

8. Intervener admits that an order was entered denying the motion on the 15th day of October, 1951 and that Petitioner's Exhibit C is a true and authentic copy of said order.

9. Intervener denies that the District Court has retained jurisdiction over the action without authority in law as alleged in paragraph numbered 1 on page 4 of the Petition for Writ of Mandamus. Intervener denies the further statement of said paragraph that Petitioner has been deprived of any right given to it by Sec. 1400(b) of Title 28, U. S. Code, but alleges the fact to be that Petitioner was sued where it resided in accordance with said section, that that section had been fully complied with in that the venue was grounded [fol. 36] upon the fact that Defendant resided and resides in the Northern District of Illinois as required by that section and that the term "resides" as used therein is defined in Sec. 1391(c) which provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Intervener denies that Sec. 1400(b) of Title 28, U. S. Code, requires that a suit for patent infringement be brought in a judicial district where a defendant has a regular and established place of business and had committed acts of infringement, or in the alternative, that such suit be brought in the district of a defendant's "incorporation", as alleged in page 2 in the Petition for Writ of Mandamus.

10. Intervener denies that Petitioner has been injured by the action of the District Court in denying its motion to dismiss the complaint for improper venue, or to transfer the case, and alleges that said motion was denied under authority of law in that Petitioner was sued for patent in-

fringement in the Northern District of Illinois wherein it resides, in accordance with the provisions of Sec. 1400(b), Title 28, U. S. Code.

11. Intervener incorporates herein by reference paragraph numbered 10 above in answer to paragraph numbered 3 on page 4 of the Petition for Writ of Mandamus and further, denies that Sec. 1400(b), Title 28, U. S. Code, requires that patent infringement actions be brought in the judicial district wherein a defendant has committed acts of infringement and has a regular and established place of business, or in the alternative, that such actions be brought in the judicial district wherein a defendant is "incorporated", but alleges the fact to be that that [fols. 37-39] section provides that an action for patent infringement may be brought in a "judicial district where the defendant resides." Intervener further denies the inferences sought to be created that Defendant's business and infringing acts are confined solely to the state of New Jersey and further denies that Defendant (Petitioner herein) has made any showing of "inconvenience and annoyance" which would result from its defending the present action for patent infringement above referred to in the United States District Court for the Northern District of Illinois, Eastern Division, and further denies that such showing, had it been made, would be sufficient ground for either dismissal of said action or transfer to another judicial district.

Wherefore, Intervener prays:

A. That the Petition for Writ of Mandamus be denied;

B. That the Order to Show Cause directed to Respondent, the Honorable John P. Barnes, Chief Judge of the United States District Court for the Northern District of Illinois, be quashed; and

C. That Respondent and Intervener have costs in this action, including reasonable attorneys' fees, and such other and further relief as may be deemed to be proper and just.

Respectfully submitted, Cardox Corporation, By Its Attorneys, Andrew J. Dallstream, Fredric H. Stafford, 231 S. LaSalle St., Chicago; George I. Haight, John W. Hofeldt, 209 South LaSalle St., Chicago.

Dated: December 7, 1951.

[fols. 40-41] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ARGUMENT AND SUBMISSION—January 18, 1952

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and briefs of counsel, and on oral argument by Mr. R. Morton Adams, counsel for petitioner, and Mr. George I. Haight, counsel for intervenor and respondent, and the Court takes this matter under advisement.

[fol. 42] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1951, JANUARY SESSION, 1952

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent

Petition for Writ of Mandamus

OPINION—February 1, 1952

Before Major, Chief Judge, Lindley and Swaim, Circuit Judges

MAJOR, Chief Judge:

The question for decision is whether the definition of corporate "residence" for venue purposes contained in Title 28 U. S. C. A. Sec. 1391 (c) applies to Sec. 1400 (b) of the same Title, relating to venue in actions for patent infringement.

On June 26, 1951, Cardox Corporation, an Illinois corporation, instituted in the Northern District of Illinois, East-

ern Division, its action against C-O-Two Fire Equipment Company, as defendant, charging patent infringement. The complaint alleged that the action arose under the patent [fol. 42a] laws of the United States, and venue was predicated upon the allegation, "defendant * * * is a corporation organized and existing under the laws of the State of Delaware, and is licensed to do business in the State of Illinois, is a resident of and has a regular and established place of business in and is doing business in the Northern District of Illinois, Eastern Division, with offices at 444 North Lake Shore Drive, Chicago, Illinois." It will be noted that there was no allegation that "the defendant has committed acts of infringement" in the District where the suit was instituted. Predicated upon this ground the defendant, on July 12, 1951, filed its motion for a dismissal of the action because of a failure to allege proper venue. Defendant also suggested to the court that instead of dismissing the action it would be appropriate to transfer it, under the discretionary provision of Sec. 1406 (a) of Title 28 U. S. C. A.

The defendant in support of its motion submitted affidavits of its president and secretary, admitting that defendant was licensed to do business and had a place of business within the Northern District of Illinois but stating that such business as was transacted there was not related to the alleged infringing acts and that defendant had committed no alleged infringing acts within the Northern District of Illinois, and admitting that it had committed acts of the kind complained of in the State of New Jersey, where the defendant maintained its principal office and manufacturing plant, kept all of its books and records relating to the alleged infringing activities and where its officers, engineers and employees who were acquainted with the alleged infringing activities were located.

On October 15, 1951, the District Court, Honorable John P. Barnes presiding, respondent herein, entered an order denying defendant's motion to dismiss or in the alternative to transfer the cause, and ordered the defendant to answer the complaint within thirty days.

On October 29, 1951, the defendant (hereinafter referred to as the petitioner) filed in this court its petition for a writ

of mandamus to the Honorable John P. Barnes, directing that he vacate and set aside the order entered October 15, [fol. 42b] 1951, denying the motion to dismiss or in the alternative to transfer the case. To this petition an answer was filed by respondent on November 14, 1951, disclaiming interest in the cause or the issues thereof other than such interest as any other citizen of the United States should have. On November 27, 1951, Cardox Corporation, plaintiff in the suit below, was, upon its petition, given leave to intervene in this court and to contest the issuance of the writ sought by petitioner. (Cardox Corporation will be hereinafter referred to as the intervenor.)

In the beginning, we conclude that this court has the power to issue the writ of mandamus and, if petitioner is correct in its position, that it is an appropriate case for the exercise of such power. *Ford Motor Co. et al.* v. *Ryan*, 182 F. 2d 329, 330; *Paramount Pictures, Inc. et al.* v. *Rodney*, 186 F. 2d 111, 116. *Cf. Ex Parte Collett*, 337 U. S. 55. We need not labor this point, however, because intervenor in its brief raises no question in this respect and in oral argument conceded both the power of the court and the appropriateness of the remedy.

The question for decision stated in the beginning, in reality, simmers down to the inquiry as to whether venue in a patent infringement suit can properly be laid in a District other than that of its incorporation, even though it has a regular and established place of business in such District, in the absence of an allegation that it has committed acts of infringement therein.

Petitioner in support of its position contends that Sec. 1391 (c), a general venue provision, has no application to Sec. 1400 (b), a special venue provision relating solely to actions for patent infringement. Petitioner cites numerous court decisions which assertedly support its position and places much reliance upon the legislative history, including the Reviser's Notes, as demonstrating a clear intention on the part of Congress to make no change in the law of venue in suits for patent infringement as it existed prior to the revision of the Judicial Code.

The intervenor contends that Secs. 1400 (b) and 1391 (c) are complementary and that the definition of "residence"

[fol. 42c] contained in the latter section must be given effect and applied to the former. Intervenor likewise cites court decisions asserted to support its contention. It, however, attaches little if any weight to the legislative history or the Reviser's Notes which accompany the two sections, on the premise that the phraseology found in the two sections, and particularly Sec. 1391 (c), is so clear and unambiguous as not to permit of any interpretation or construction. Intervenor's argument goes to the extent of asserting that the adoption of petitioner's position would require judicial legislation by adding at the end of Sec. 1391 (c) the phrase, "except in patent litigation."

Much is said by the parties in their briefs relative to the interpretation or construction which should be given to the two sections in controversy but, in our view, it is more accurate to state that the issue depends upon whether the two sections must be read together or, more pointedly, whether Sec. 1391 (c) is applicable to Sec. 1400 (b). The numerous sections of Chapter 87 of the Judicial Code prescribe the venue of District Courts under a variety of circumstances. Sec. 1391 (c), entitled "Venue generally," provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Sec. 1400 (b), entitled "Patents and copyrights," provides:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Thus, the former section is general and applies only to a corporation, while the latter is special, relating to a specific subject matter and evidently is applicable to individuals as well as corporations. We agree with the inter- [fol. 42d] venor's contention that the phraseology of Sec. 1391 (c) is clear, plain and unambiguous and is not sus-

No. 25

No. 25

NOTE SUBMITTED BY RESPONDENT AT ARGUMENT

§1695 - Stockholder's derivative action

"Process in a stockholder's action in behalf of his corporation may be served upon such corporation in any district where it is organized or licensed to do business or is doing business."

REVISER'S NOTE

"Based on title 28, U.S.C., 1940 ed., § 112 (Mar. 3, 1911, ch. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

"The phrase 'is organized or licensed to do business or is doing business' was substituted for the words 'resides or is found,' as more specific and to conform to section 1391 of this title.

"Venue provisions of section 112 of title 28, U.S.C., 1940 ed., appear in section 1391 and 1401 of this title. Other provisions are incorporated in section 1693 of this title.

"Changes were made in phraseology."

The corresponding portion of prior §112 read as follows:

> ". . . except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found. . ."

ceptible to interpretation or construction. But even so, the point is immaterial. The question is whether Sec. 1391 (c) has any application to Sec. 1400 (b), or more pointedly, whether the latter section is dependent for its force and vitality upon the former. And the acceptance of petitioner's contention requires no interpretation or construction of Sec. 1391 (c) other than that it be held inapplicable to an action for patent infringement. Sec. 1391 (c) would remain just as it is written, to be given application in an appropriate situation.

On the other hand, intervenor's contention, if accepted, would result in partial if not complete emasculation of Sec. 1400 (b) as it relates to a corporate defendant in actions for patent infringement. This incongruous result is highlighted by a recasting of the section so that it will read in accordance with such contention. The following is the result (the italized words we insert):

> "Any civil action *against a corporation* for patent infringement may be brought in the judicial district where the defendant resides, *to wit, in the judicial district in which it is incorporated or licensed to do business or is doing business*, or where the defendant has committed acts of infringement and has a regular and established place of business."

The two alternatives for venue in Sec. 1400 (b) stem from old Sec. 109 (Judicial Code Sec. 48), with only slight changes in phraseology. As to this predecessor provision, it has been held that it conferred upon defendants in patent cases a privilege in respect to the places in which suits could be maintained against them. *General Electric Co. et al.* v. *Marvel Rare Metals Co. et al.*, 287 U. S. 430, 435. See also *Stonite Products Co.* v. *Melvin Lloyd Co. et al.*, 315 U. S. 561. No purpose is discernible on the part of Congress, in its revision, to eliminate or minimize this privilege or the protection which it afforded. And certainly if there had been such a purpose, Congress would not have [fol. 42e] attempted to accomplish it in such an awkward and indirect fashion.

A reading of the provision recast conformable to inter-

venor's contention makes it apparent, so we think, that the first alternative as a venue limitation becomes abortive and the second meaningless if not inconsistent. What purpose could be served in limiting venue to the District where the defendant resides if that includes not only the District of its incorporation but also a District either in which it is licensed to do business or is doing business? And if a corporation can be sued where it "is doing business," what possible purpose can be served by the second venue alternative, "where the defendant has committed acts of infringement and has a regular and established place of business"? Intervenor's contention would permit a suit to be brought in the District where the defendant "is doing business" but not in the District where it has a "regular and established place of business" in the absence of a showing that the defendant "has committed acts of infringement" in such District. Such an anomalous theory, if embraced, would make a dead letter out of the second alternative in the patent venue section. The plaintiff in determining proper venue for his suit against a corporation for patent infringement would hardly need to read Sec. 1400 (b). Why bother with an allegation that the "defendant has committed acts of infringement and has a regular and established place of business" in the District, which it later would be required to prove, when an allegation that the defendant is "doing business" in the District would suffice? And it would be futile for the defendant to rely upon the special venue provision in a patent infringement suit because the privilege or protection which that section was designed to afford would no longer exist. In fact, it appears to us that the theory which intervenor would have us embrace would make the patent venue section more inclusive than the general corporate venue section.

In the Stonite case (315 U. S. 561), the court held that a general venue statute must give way to Sec. 48, the special statute relating to venue in patent infringement suits. The court reasoned that the special statute was not affected by [fol. 42f] general provisions, that the former was adopted "to define the exact jurisdiction of the federal courts in actions to enforce patent rights," and that such purpose indicated that Congress did not intend "to dovetail with the

general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings." True, this decision was prior to the adoption of the present Code and is, therefore, not decisive of the instant question, but the rationale which the court employed is, in our opinion, pertinent to the present situation. Especially is this so when no purpose to change the existing law is evidenced by a reading of the two sections under consideration or by the Reviser's Notes shown in connection therewith. And it doesn't seem likely that Congress would have made such an important departure from the law as it then existed relative to venue in patent infringement cases without so stating.

Intervenor's argument that the residence of a corporation was not defined in Sec. 1400 (b) and that resort must, therefore, be had to Sec. 1391 (c) at least has the virtue of some plausibility; however, we think the argument must be rejected on the basis that the latter section is without application. Moreover, as heretofore stated, the Reviser's Notes unmistakably disclose that the only change made in the patent venue section as it then existed was one of phraseology and not of substance. In fact, the only change made pertinent to the question under discussion, as stated in the Reviser's Notes (following Sec. 1400), is as follows:

> "Words in subsection (b) 'where the defendant resides' were substituted for 'of which the defendant is an inhabitant.' A corresponding change was made in subsection (a). Words 'inhabitant' and 'resident,' as respects venue, are synonymous.

We think there is disclosed an unmistakable intention as well as purpose neither to enlarge nor diminish the venue in patent infringement suits but to leave it as it then existed, and that means, of course, that under the first alternative of the section a defendant corporation can be sued only in the place of its incorporation.

[fol. 42g] Intervenor places much stress upon *Ex Parte Collett*, 337 U. S. 55, and asserts that practically every argument advanced by the petitioner here was made by the petitioner in that case and rejected by the Supreme Court. We are of the view that the reasoning of the Collett case is

inapplicable here, and in any event not controlling. There, the court held that Sec. 1404(a), relating to the right to transfer, was applicable to Sec. 6 of the Federal Employers' Liability Act, which determined venue in actions thereunder. Relative thereto, the court stated (page 60):

> "Section 6 of the Liability Act defines the proper forum; §1404 (a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404 (a) does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously."

We think it apparent that the situation before the court in that case was quite different from that of the instant case. There, the court was dealing with two sections, one which bestowed venue and the other which provided for transfer when venue was properly laid, and the latter did not "limit or otherwise modify any right granted in" the former. Thus the court gave effect to both provisions because they were not inconsistent and neither provision abridged any right contained in the other. In contrast, the two sections in the instant matter both relate to venue and they cannot be applied, as intervenor would have us do, without making one section dependent upon the other and, as already shown, this would result for all practical purposes in the emasculation of Sec. 1400 (b).

The instant question has been before the District Courts in a number of cases, some precisely in point and others persuasive because of their close analogy. The weight of such decisions militates strongly against the intervenor's position. One of the best reasoned opinions is that of Dis-[fol. 42h] trict Judge Harrison in *Gulf Research & Development Co. et al.* v. *Schlumberger Well Surveying Corp.*, 92 F. Supp. 17. Among other things he stated (page 19), "The Reviser's Notes make it evident that today, 1400 (b) stands in the same situation as did Section 109 at the time of the Stonite opinion in 1942 and that the Stonite case is just as much in point now as then," and "I hold that Section 1391

(c) is not complementary to Section 1400 (b); that the word 'resides' in Section 1400 (b) means the same as the word 'inhabitant' in the former Section 109, and that the interpretation placed upon said former Section 109 applies to its revision as set forth in the revised Section 1400 (b)." This opinion is also interesting from the fact that Judge Harrison reached a result opposite to that reached by two of his associates on the same court. *Farr Co.* v. *Gratiot et al.*, 92 F. Supp. 320, and *Radio Corp. of America* v. *Paramount Pictures, Inc.* (P. C. S. D. Cal. 1950), an unreported decision. The opinion in the Farr case was written by District Judge Hall. The opinions in these two cases, that is, in Gulf and Farr, written by Judges in the same District, contain about all that can be said on the opposing sides of the controversy. We think Judge Harrison reached the right result.

In *Nachtman* v. *Jones & Laughlin Steel Corp.*, 90 F. Supp. 739, the court held that Sec. 1400 (b) was not enlarged by Sec. 1391 (c) and that to do so would completely nullify "the specific venue statute relative to patent infringement suits."

In *Fischer* v. *Karl et al.*, 84 F. Supp. 53, 55, the court stated:

> "In a word, to grant this motion would be to render 28 U. S. C. A. §1400 (b) completely meaningless. If Congress intended that the venue provisions of 28 U. S. C. A. §1392 (a) here invoked were applicable to patent suits, it is impossible to conceive why it was found necessary to enact new 28 U. S. C. A. §1400 (b), which, at least in the case at bar, is a limitation of venue specifically applicable to the cause."

[fol. 42i] We cite without further comment the other cases which support in one form or another petitioner's position. *Ackerman* v. *Hook et al.*, 183 F. 2d 11; *Arkay Infants Wear, Inc.* v. *Kline's, Inc. et al.*, 85 F. Supp. 98; *Rava* v. *Westinghouse Electric Corp.*, 90 F. Supp. 707; *Curtis et al.* v. *Madovoy et al.*, 84 F. Supp. 637; *Aetna Ball & Roller Bearing Co.* v. *The Federal Bearing Co., Inc.*, decided by Judge Igoe in the Northern District of Illinois (not reported).

Holding as we do that venue was improperly laid, the

relief sought by the petitioner must be granted. Title 28 U. S. C. A. Sec. 1406 (a) undoubtedly is applicable to the situation. It provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Thus, two alternatives are provided, (1) a dismissal of the case or (2) if it be in the interest of justice, a transfer to the appropriate District. Respondent, therefore, is directed to give effect to one or the other of such alternatives, without prejudice to his right to decide which it shall be.

LINDLEY, C. J. dissenting:

The problem here seems to me a simple one. Sec. 1400 (b) of Title 28 U. S. C. provides, in its very first clause, that an action "for patent infringement may be brought in the judicial district where the defendant resides." Sec. 1391 (c) of Title 28 U. S. C. prescribes that the district in which a corporation is incorporated or licensed to do business or is doing business "shall be regarded as the residence of such corporation for venue purposes." The intervenor, plaintiff below, averred in its complaint that defendant, petitioner here, is a corporation licensed to do business in Illinois and is doing business within the Northern District of Ilinois, thus bringing defendant within the class of corporate defendants whose residence is, by virtue of Sec. 1391 (c), within the Northern District of Illinois. It seems to me that the District Court could not have done [fols. 42j-43] other than it did without doing violence to the clear provisions of the two sections. Inasmuch as defendant is a resident of the Northern District of Illinois, by virtue of the express provisions of Sec. 1391 (c), plaintiff had a right, under Sec. 1400 (b), to bring the suit in that District. To hold otherwise seems to me to require that we interpolate at the end of Sec. 1391 (c) the phrase "except in patent infringement cases." To do so is beyond our function. I would deny the petition.

[fols. 44-45] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 10512

C-O-TWO FIRE EQUIPMENT COMPANY, Petitioner,

vs.

JOHN P. BARNES, Judge of the United States District Court for the Northern District of Illinois, Respondent,

CARDOX CORPORATION, Intervenor

JUDGMENT GIVING RESPONDENT TWO ALTERNATIVES—February 1, 1952

This matter came on to be heard before the Court on an original Petition for Writ of Mandamus, the answer of Respondent thereto, and the Intervenor's answer thereto.

On consideration whereof, it is ordered and adjudged by this Court that Respondent be directed to give effect to one or the other of the following alternatives, (1) a dismissal of the case or (2) if it be in the interest of justice, a transfer to the appropriate District.

[fols. 46-48] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

PETITION TO STAY THE MANDATE—Filed February 11, 1952

To the Judges of the United States Court of Appeals for the Seventh Circuit:

Now comes Cardox Corporation, Intervener in the above entitled cause, by its attorneys, and moves this Court to stay issuance of the mandate herein pending the outcome of a petition for the writ of certiorari to be filed by Intervener to the Supreme Court of the United States.

Respectfully submitted, Andrew J. Dallstream, Fredric H. Stafford, 231 South LaSalle Street, Chicago 4, Illinois; George I. Haight, John W. Hofeldt, 209 South LaSalle Street, Chicago 4, Illinois.

[fols. 49-50] UNITED STATES COURT OF APPEALS FOR TH
SEVENTH CIRCUIT

[Title omitted]

ORDER STAYING MANDATE—February 12, 1952

On motion of counsel for Cardox Corporation, Interveno
in this cause, it is ordered that the issuance of the mandat
of this Court in this cause be, and the same is hereby, staye
for a period of thirty days pursuant to the provisions o
Rule 25 of the Rules of this Court.

[fol. 51] IN THE UNITED STATES COURT OF APPEALS FOR TH
SEVENTH CIRCUIT

[Title omitted]

DESIGNATION FOR THE UNITED STATES SUPREME COURT
RECORD—Filed February 14, 1952

To Kenneth J. Carrick, Clerk, United States Court of Ap
peals for the Seventh Circuit, 1212 Lake Shore Driv
Chicago, Illinois:

Please prepare a record for use in connection with a Pet
tion for the Writ of Certiorari in the Supreme Court of th
United States and include therein the following:

1. Application for leave to file Petition for the Writ o
Mandamus.

2. Order granting leave to file Petition for the Writ o
Mandamus.

3. Petition for the Writ of Mandamus.

4. Order to show cause returnable in thirty days and stay
ing proceedings.

5. Respondent's answer to Petition for the Writ o
Mandamus.

6. Petition of Cardox Corporation for leave to inte
vene.

7. Order granting leave to Cardox Corporation to inte
vene, etc.

[fols. 52-53] 8. Intervener's answer to Petition for the Writ of Mandamus.

9. Order taking cause under advisement.

10. Opinion by Chief Judge Major and dissenting opinion of Circuit Judge Lindley.

11. Judgment giving Respondent two alternatives.

12. Petition for stay of mandate and order staying same.

Andrew J. Dallstream, Fredric H. Stafford, 231 South LaSalle Street, Chicago 4, Illinois; George I. Haight, John W. Hofeldt, 209 South LaSalle Street, Chicago 4, Illinois.

[fol. 54] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO 10, ILLINOIS

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 25

CARDOX CORPORATION, Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY

ORDER ALLOWING CERTIORARI—Filed April 21, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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Office - Supreme Court, U.
FILED
MAR 12 1952
CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. [redacted] 25

CARDOX CORPORATION,
Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GEORGE I. HAIGHT
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209 South LaSalle Street
Chicago 4, Illinois
ANDREW J. DALLSTREAM
FREDRIC H. STAFFORD
231 South LaSalle Street
Chicago 4, Illinois
Counsel for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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Mincy v. Detroit and Cleveland Navigation Co., 94 F. Supp. 456, (D.C. S.D. N.Y., 1950) 8

Nachtman v. Jones and Laughlin Steel Corp., 90 F. Supp. 739 (D.C. D. of C., 1950) 7

Radio Corporation of America v. Paramount Pictures, Inc., et al., (D.C. S.D. Cal., 1950), Civil Action No. 8070-WM, unreported 6, 7

Sponge Products v. Fuller Brush Co., (D.C. N.D. Ill. 1951), Civil Action No. 51 C. 382, unreported 6, 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No.

CARDOX CORPORATION,
Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Cardox Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 1, 1952, granting a Petition for the Writ of Mandamus in the case of *C-O-Two Fire Equipment Company* v. *John P. Barnes, Judge of the United States District Court for the Northern District of Illinois,* No. 10512, in which case this Petitioner was permitted to and did intervene. The judgment of the United States Court of Appeals for the Seventh Circuit directed

Judge Barnes to vacate and set aside an order entered by him on October 15, 1951 in an action entitled *Cardox Corporation* v. *C-O-Two Fire Equipment Company,* Civil Action No. 51-C-1007. That order denied a motion of Respondent, Defendant in that Court, to dismiss, or in the alternative, to transfer the cause, and ordered Defendant to answer the Complaint within thirty days.

Summary and Statement of the Matter Involved.

On June 26, 1951, Petitioner filed, in the United States District Court for the Northern District of Illinois, a Complaint charging Respondent with patent infringement (R. 7). Venue was predicated upon the allegation that the defendant corporation was licensed to do business in the State of Illinois and therefore was a resident thereof (R. 7). On July 12, 1951, Respondent moved to dismiss, or in the alternative to transfer the action (R. 9). The ground for this motion was that the defendant corporation was not incorporated in the State of Illinois and the Complaint contained no allegation that the Defendant had committed acts of infringement within the Northern District of Illinois, that therefore there was no proper venue. On October 15, 1951 Judge Barnes denied Respondent's motion and ordered that an answer be filed (R. 13). The basis for Judge Barnes' decision was that under the Judicial Code as revised and effective September 1, 1948, the grounds for venue in a patent infringement action included that of residence (Title 28 U.S.C., Section 1400(b)) and that as concerns a corporate defendant, Congress had defined residence as including any judicial district within which a corporate defendant was licensed to do business (Title 28 U.S.C., Section 1391(c)).

On October 29, 1951, a Petition for the Writ of Mandamus was filed by Respondent in the United States Court of Appeals for the Seventh Circuit, directing Judge Barnes to nullify, vacate, and set aside the order denying Respondent's motion and further directing Judge Barnes to grant the relief asked for in Respondent's motion (R. 2). Judge Barnes filed his answer thereto on November 14, 1951 (R. 14), disclaiming interest in the case or the issues thereof, other than such interest as any other citizen of the United States should have. Whereupon, on November 27, 1951, Petitioner (Intervener below) petitioned for leave to intervene, to file a pleading in opposition to the Petition, to file a brief, and to participate in oral argument (R. 15). The Court of Appeals granted such leave (R. 16) and Petitioner's answer to the Petition for the Writ of Mandamus was filed on December 7, 1951 (R. 17).

The Court of Appeals, on February 1, 1952, directed Judge Barnes either to dismiss the case or transfer to an appropriate district if it were in the interest of justice to do so, pursuant to Title 28, U.S.C., Section 1406(a), (R. 31). The majority opinion of the Court of Appeals held that under Title 28, U.S.C. Section 1400(b) a corporate defendant must be sued for patent infringement either in the district wherein it is incorporated or in the judicial district where it has a regular and established place of business and has committed acts of infringement (R. 21). Judge Lindley dissented upon the ground that a patent infringement action may be brought in the judicial district where a defendant resides under Section 1400(b) of Title 28 U.S.C., and that Section 1391(c) of Title 28 U.S.C. defines the residence of a corporate defendant "for venue purposes" as including any judicial district wherein the corporate defendant is licensed to do business (R. 30).

Petitioner did not contest either the power of the Court of Appeals to issue the Writ of Mandamus or the appropriateness of such remedy, but disputed the position of Respondent on the venue question (R. 23). Petitioner adheres to this position. However, Petitioner notes that the United States Court of Appeals for the Third Circuit in *Gulf Research & Development Company, et al.* v. *Leahy, et al.*, 193 F. (2d) 302 (C.A. 3, 1951), held that mandamus was inappropriate to review, in advance of a trial on the merits, a ruling by a District Court on precisely the identical venue issue here involved. Some of the language in the opinion cited could be construed as denying the existence of the *power* to issue a writ of mandamus where the error complained of involves a definite want of statutory authority and not merely an abuse of discretion in balancing the conveniences involved.

Opinions Below.

The order of the District Court denying Respondent's motion to dismiss the cause or in the alternative to transfer (R. 13), issued without opinion and is unreported. The opinion of the Court of Appeals directing Judge Barnes to either dismiss the case or to transfer the case to the appropriate district, if it were in the interest of justice so to do (R. 21), is reported in ..... F. (2d) ..... (C.A. 7, 1952).

Jurisdiction.

The judgment of the Court of Appeals was entered on February 1, 1952 (R. 31). The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

Question Presented.

Congress having provided that venue in a patent infringement action includes "the Judicial District where the defendant resides" (Title 28 U.S.C., Section 1400(b)), and having provided that any judicial district in which a corporation is "licensed to do business • • • shall be regarded as the residence of such corporation for venue purposes" (Title 28 U.S.C., Section 1391(c)), is venue in a patent infringement action properly laid in a judicial district in which the defendant corporation is licensed to do business?

Statutes Involved.

Title 28 U.S.C., Section 1400. Patents and copyrights.

• • •

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

• • •

Title 28 U.S.C., Section 1391. Venue generally.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Reasons for Granting the Writ.

1. The question presented is an important question of Federal Law which has not been, but which should be settled by the Supreme Court.

The question of proper venue in patent infringement actions against corporate defendants is a matter of great importance to orderly judicial procedure.

Whether the phrase "for venue purposes" in the Congressional definition of corporate residence enacted as Title 28 U.S.C., Section 1391(c), includes patent infringement actions is a question of obvious importance to Federal District Courts. Its answer decides the power of such Courts to proceed in many cases in this important branch of Federal Law.

The necessity for an early decision on this question by this Court is shown by the confusion in the District Courts which has existed since the revision and amendment of the Judicial Code, effective September 1, 1948. So far as Petitioner's research has revealed, in addition to the proceedings by Judge Barnes in the instant case, three courts have decided the question in the affirmative. The cases so holding are: *Radio Corporation of America* v. *Paramount Pictures, Incorporated, et al,* (D.C. S.D. Cal., 1950), Civil Action No. 8070-WM, unreported; *Farr* v. *Gratiot, et al,* 92 F. Supp. 320, (D.C. S.D. Cal., 1950); and, *Sponge Products* v. *Fuller Brush Company,* (D.C. N.D. Ill., 1951), Civil Action No. 51 C 382, unreported.

In four other cases District Courts have decided that in spite of the unambiguous language of the statutes involved, a corporate defendant in a patent infringement action may be sued only in the district of its incorporation or in a district where it has a regular and established place of business and has committed acts of infringement. They are: *Gulf Research and Development Company, et al,* v. *Schlumberger Well Surveying Corporation,* 92 F. Supp. 16, (D.C. S.D. Cal., 1950); *Aetna Ball and Roller Bearing Company* v. *The Federal Bearing Company, Incorporated,*

(D.C. N.D. Ill., 1950), Civil Action No. 50 C 857, unreported; *Nachtman* v. *Jones and Laughlin Steel Corporation,* 90 F. Supp. 739, (D.C. D. of C., 1950); and, *Dalton* v. *Shakespeare Company,* (D.C. S.D. Fla., 1951), Case No. 1884 —Civil Tampa, unreported. Petitioners are advised that in the *Dalton* v. *Shakespeare* case, an appeal has been taken to the Court of Appeals for the Fifth Circuit and is currently pending therein.

Further, in the instant case the District Court had decided that a corporation could be sued for patent infringement in a district where it was licensed to do business. Although the Court of Appeals held that it could not be sued in such district, that Court itself was divided on the question with Judge Lindley dissenting upon the ground that the District Court could not have dismissed the action without "doing violence to the clear provisions of the two sections" (R. 30).

The importance of the question presented is further emphasized when it is considered that the definition of corporate residence found in Title 28 U.S.C., Section 1391(c) must, of necessity, have application to special venue statutes other than that relating to the patent infringement actions. Confusion in the lower courts will be multiplied until this Court determines whether or not the language of Section 1391(c) means what it says, namely, that it defines residence "for venue purposes".

2. The decision of the Court of Appeals conflicts with decisions of other Federal Courts.

The identical issue here before the Court and before the Court of Appeals was decided in *Farr* v. *Gratiot, et al,* 92 F. Supp. 320, (D.C. S.D. Cal., 1950) and *Radio Corporation of America* v. *Paramount Pictures, Incorporated, et al,* (D.C. S.D. Cal., 1950), Civil Action 8070-WM, un-

reported, and *Sponge Products* v. *Fuller Brush Company,* (D.C. N.D. Ill., 1951), Civil Action 51 C 382, unreported. The Court of Appeals reached the opposite result from that of those Courts.

The Court of Appeals below not only reached a conclusion opposite to that of the Court in the *Farr* case on the venue issue, but in so doing applied a rule of statutory construction in conflict with the rule applied by the Court in the *Farr* case. The Court in the *Farr* case stated (92 F. Supp. 320):

> "* * * Furthermore, I cannot agree that the reviser's notes as to any particular section should control over the text of the Code, where there is no ambiguity in the text."

Moreover, on both the issue of venue in patent infringement suits and on the issue of statutory construction, the Court of Appeals itself was divided.

In addition to the conflict in the lower courts on the question of venue as to corporate defendants in patent infringement actions, conflict exists between those cases and cases deciding the applicability of the definition to other special venue statutes.

In *Bagner* v. *Blidberg Rothchild Company,* 84 F. Supp. 973, (D.C. E.D. Pa., 1949), *Bounds* v. *Streckfus Steamers,* 89 F. Supp. 242, (D.C. Del., 1950) and *Mincy* v. *Detroit and Cleveland Navigation Company,* 94 F. Supp. 456, (D.C. S.D. N.Y., 1950) the Courts held that the definition applied to actions brought under Title 46 U.S.C., Section 688 (the Jones act) and in *Lipp et al,* v. *National Screen Service Corporation,* 95 F. Supp. 66, (D.C. E.D. Pa., 1950) the Court held the definition to apply to actions under Title 15 U.S.C., Section 22 (the Clayton Act).

The uncertainty facing litigants and courts alike in patent infringement actions is emphasized by the fact that in the Southern District of California the judges themselves are in disagreement, and whether proper venue exists depends upon the view of the particular judge trying the case.

Petitioners have been unable to find any decision by this Court dealing either with the question as applied to patent infringement actions or the broader question of whether the definition applies to actions brought under other special venue statutes.

3. The decision of the Court of Appeals conflicts with applicable decisions of this Court concerning the proper rules for statutory construction.

In *Ex Parte Collett*, 337 U.S. 55 (1949) this Court decided a question arising under the venue statutes of the revised Judicial Code. The question there presented is remarkably similar to the question in the instant case. There, this Court was confronted with the issue of whether the doctrine of *forum non conveniens*, enacted as Section 1404(a) of Title 28 U.S.C., was applicable to cases arising under the Federal Employers' Liability Act (Title 45 U.S.C., Sections 51-59). Prior to the revision of the Judicial Code, this Court had decided that the doctrine was not applicable to that type of case. However, under the revised Code this Court in construing the statutes involved stated at page 61:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of §1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly

> ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions."

The doctrine of the *Collett* case was applied by this Court to similar facts involving the same issue in *Kilpatrick* v. *Texas and Pacific Railway Company*, 337 U.S. 75 (1949).

The identical rule of statutory construction was applied by this Court in *United States* v. *National City Lines, Incorporated*, 337 U.S. 78 (1949) wherein the question involved was whether the doctrine of *forum non conveniens* was applicable to actions arising under the anti-trust laws. This Court decided that the doctrine enacted as Section 1404(a) of Title 28 U.S.C. was applicable by reason of "the unequivocal words of Sec. 1404(a)" (337 U.S. 84).

The decision of the Court of Appeals in construing the venue sections involved is in direct conflict with the rules of statutory construction applied by this Court in the *Collett* case. The dissenting opinion of Judge Lindley is a correct statement of the applicable law as announced by this Court. The dissent states (R. 30):

> "The problem here seems to me a simple one. Sec. 1400(b) of Title 28 U.S.C. provides, in its very first clause, that an action 'for patent infringement may be brought in the judicial district where the defendant resides.' Sec. 1391(c) of Title 28 U.S.C. prescribes that the district in which a corporation is incorporated or licensed to do business or is doing business 'shall be regarded as the residence of such corporation for venue purposes.' The intervenor, plaintiff below, averred in its complaint that defendant, petitioner here, is a corporation licensed to do business in Illinois and is doing business within the Northern District of Illinois, thus bringing defendant within the class of corporate defendants whose resi-

dence is, by virtue of Sec. 1391(c), within the Northern District of Illinois. It seems to me that the District Court could not have done other than it did without doing violence to the clear provisions of the two sections. Inasmuch as defendant is a resident of the Northern District of Illinois, by virtue of the express provisions of Sec. 1391(c), plaintiff had a right, under Sec. 1400(b), to bring the suit in that District. To hold otherwise seems to me to require that we interpolate at the end of Sec. 1391(c) the phrase 'except in patent infringement cases.' To do so is beyond our function. I would deny the petition."

The majority opinion results in a judicial re-write of both sections 1391(c) and 1400(b) of Title 28 U.S.C. The effect of the majority opinion, as pointed out in the dissenting opinion (R. 30), is the addition to the end of Section 1391(c) of the phrase "except in patent infringement cases."

Section 1400(b) is in effect rewritten by the Court of Appeals to read:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant (if an individual) resides, (or, if a corporation, then in the judicial district where such defendant is incorporated), or where the defendant (either individual or corporate) has committed acts of infringement and has a regular and established place of business."

The conflicts in opinions as noted, not only on the issue of the applicability of the definition of corporate residence (Title 28 U.S.C., Section 1391(c)) to patent infringement actions (Title 28 U.S.C., Section 1400 (b)), but also on the proper rule of statutory construction, are conflicts on important issues which have not been but should be settled by this Court.

In the *Collett* case this Court assigned as its reason for hearing the case that the issue involved "seemed of importance in the administration of justice", and noted the conflict in the decisions of District Courts on the issue (337 U.S. 57). The issue in the instant case is of equal importance. Also, a conflict of decisions exists in the District Courts. Further, the majority opinion of the Court of Appeals below is in conflict with applicable decisions of this Court on the question of statutory construction.

CONCLUSION.

For the foregoing reasons this petition for the writ of certiorari should be granted.

Respectfully submitted

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FILED
MAR 10 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. [redacted] 25

CARDOX CORPORATION,

Petitioner,

v.

C-O-TWO FIRE EQUIPMENT COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. MORTON ADAMS,
IRVING HERRIOTT,
EDWARD T. CONNORS,
Counsel for Respondent.

April 1952.

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